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Supreme Court, U.S.
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No. 99-1041

IN THE

Supreme Court of the United States

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and ELLEN BROOKS, in her official capacity as Montgomery District Attorney,

Petitioners,

—v.—

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and WILLIAM H. KNORR, M.D., on behalf of themselves and their patients seeking abortions,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court below properly refused to engage in plenary review of all jurisdictional issues in an Eleventh Amendment collateral order appeal?

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Respondents Summit Medical Associates, P.C., Beacon Women's Center, New Woman, All Women Health Care, and William H. Knorr, M.D., respectfully submit the following brief in opposition to the petition for a writ of certiorari filed by Alabama Attorney General Bill Pryor and Montgomery County District Attorney Brooks [collectively "the Attorney General"].

COUNTERSTATEMENT OF THE CASE

This case was filed on July 25, 1997, as a pre-enforcement challenge to two Alabama abortion statutes. One statute bans "partial-birth abortion," a term defined so broadly by that statute that numerous courts have held that similar statutes could prohibit most first and second trimester abortions. *See, e.g., Planned Parenthood v. Verniero*, 41 F. Supp. 2d 478, 493-94 (D.N.J. 1998), *appeal docketed*, No.99-5042 (3d Cir. argued Nov. 19, 1999). The second statute restricts post-viability abortions and imposes viability testing requirements beginning at nineteen weeks of pregnancy. The complaint alleges that these statutes violate the right to privacy, the pregnant woman's right to life, and that the statutes are void for vagueness. Complaint at 21-23 ¶¶ 64, 66, 68, 70, 76, 78.

In response to the filing of the lawsuit, Attorney General Pryor by letter directed four Alabama district attorneys to limit their prosecutions under the partial-birth abortion ban statute to post-viability abortions. Nevertheless, as Mr. Pryor has elsewhere made clear to this Court, the partial-birth abortion ban is not limited to post-viability abortions. *See* Brief of Amici Curiae Alabama, et al., *Stenberg v. Carhart*, No. 99-830, at 9 n.8 ("The partial-birth abortion statutes . . . are not limited to viable children [sic]."). Mr. Pryor gave no instruction to any Alabama district attorney regarding enforcement of the post-viability statute.

Although none of the plaintiffs alleged in the Complaint that they performed post-viability abortions, some plaintiffs alleged that they perform abortions after the point at which the post-viability statute requires viability testing; and counsel for the Attorney General agreed that he might view certain abortions performed by plaintiffs as post-viability abortions. *See* Transcript of Argument on Motion to Dismiss at 28-29. All the plaintiffs alleged that they performed abortions that could be prohibited by the partial-birth abortion ban statute. *See* Complaint at 4 ¶ 13.

The Attorney General filed an omnibus motion to dismiss, on the grounds, *inter alia*, that the suit (which sought only prospective injunctive and declaratory relief) was barred by the Eleventh Amendment, and that plaintiffs lacked standing to sue. The district court, in a carefully considered opinion, rejected both of these claims. 44a-54a, 55a-64a.[1]

The Attorney General appealed the district court's rejection of its claim of Eleventh Amendment immunity. The district court, finding the appeal non-frivolous, stayed further proceedings pending the outcome of the interlocutory appeal. 155a. The Attorney General also asked the court of appeals to find that plaintiffs lacked standing to sue and that, consequently, the case should be dismissed on Article III jurisdictional grounds. The court of appeals affirmed the district court's judgment that the Attorney General was not immune from suit under the Eleventh Amendment as to the criminal liability portions of the partial-birth abortion statute and as to the post-viability statute, but reversed the district court's judgment as to the civil liability portion of the partial-birth statute, finding that the Attorney General was immune because he had no tangible role in enforcement of this portion of the statute. 27a. The court of appeals further held that plaintiffs' standing was not "inextricably intertwined"

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[1] Citations to the Appendix to the Petition are given in the form "__a."

with the Attorney General's Eleventh Amendment immunity defense, nor was consideration of plaintiffs' standing "necessary to ensure meaningful review" of the Eleventh Amendment issue. 15a. Accordingly, after rejecting the Attorney General's Eleventh Amendment immunity claim, the court below declined to address the question of plaintiffs' standing, writing that it "may be litigated on appeal from any final judgment." 28a.

On the Attorney General's petition for rehearing and rehearing en banc, no judge in active service requested a poll; the petition was thus denied. 157a. The court of appeals also denied the Attorney General's motion for a stay of its mandate pending the Attorney General's petition for certiorari. Because the Attorney General did not raise the Eleventh Amendment immunity issue in its Petition to this Court, the district court's rejection of the Attorney General's Eleventh Amendment claim is now *res judicata*.

REASONS FOR DENYING THE WRIT

The Petition seeks to expand radically the collateral order doctrine established by this Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), by permitting state officials who have appealed an issue that falls *within* that doctrine also to appeal *any other jurisdictional issue*, even if it would not, in its own right, fall within that doctrine. This effort runs directly counter to this Court's clear instruction:

> [W]e have also repeatedly stressed that the "narrow" [collateral order] exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated . . . .

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (citations omitted). The petition should therefore be denied. *See also id.* at 869 n.3 (court of appeals lacks subject matter jurisdiction over interlocutory appeal that does not meet the *Cohen* requirements).

Moreover, the Petition fails to demonstrate any direct conflict with this Court's decisions, instead pointing out only a "conflict" with certain general jurisdictional principles, never held applicable to collateral order appeals, and none of which the decision of the court below threatens. The Petition likewise fails to establish a direct conflict between the decision below and the decision of another court of appeals. Instead, the Petition tries to piece together such a conflict out of *dicta* from one court of appeals decision, a concurring opinion from another court of appeals, and a second decision from the court below.

I. THE DECISION BELOW IS IN HARMONY WITH THIS COURT'S DECISIONS NARROWLY CIRCUMSCRIBING COLLATERAL ORDER APPEALS.

By statute, the jurisdiction of United States courts of appeals extends only to "final decisions" of district courts, 28 U.S.C. § 1291, and certain specifically enumerated interlocutory orders. *See* 28 U.S.C. § 1292. This Court has, however, under the rubric of the "collateral order" doctrine, construed the term "final decision" to include "a small category of decisions that, although they do not end the litigation, must nonetheless be considered 'final.'" *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995) (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). This small category includes appeals from interlocutory orders denying motions to dismiss on Eleventh Amendment grounds, such as that decided by the court below. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

The category of immediately appealable interlocutory orders does not include, and has never been held to include, appeals from motions to dismiss on grounds of lack of standing, ripeness or mootness, or on grounds of lack of subject matter jurisdiction generally. *See Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 497 n.2 (7th Cir. 1993) (standing); *Crymes v. DeKalb County*, 923 F.2d 1482, 1484 (11th Cir. 1991) (ripeness); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974) (standing). Put differently, although litigants have a right to have these issues decided before the merits of a case are decided -- a right exercised and honored by the district court below -- they do not have the right to have these issues decided by a court of appeals before a final judgment has been reached by the trial court.

In *Swint,* this Court declined to "definitively or preemptively settle . . . whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves appealable." 514 U.S. at 50-51. Instead, *Swint* suggests that such conjunctive review of an otherwise unappealable ruling should only be considered when it is "inextricably intertwined" with, or "necessary to ensure meaningful review of," the appeal over which the court of appeals has jurisdiction. 514 U.S. at 51.

The Attorney General does not here contend that the standing of the plaintiffs meets either of these criteria, or that a ruling on plaintiffs' standing to sue itself comes within the collateral order doctrine. Instead, the Attorney General simply argues that the approach adopted by the court below conflicts with the principle that a federal court has an independent obligation to address its Article III jurisdiction. This purported "conflict," however, misconceives both the collateral order doctrine and the nature of a federal court's "obligation" to examine its own Article III jurisdiction.

First, the collateral order doctrine, as *Swint* makes clear, should not be abused by courts of appeals as a vehicle by which to engage in interlocutory review of "further rulings of a kind neither independently appealable nor certified by the district court," 514 U.S. at 47, because such abuse would depart "from the statutory instructions Congress has given to control the timing of appellate proceedings." *Id.* The approach of the court below is fully consistent with this important principle in *Swint*.

Second, "the finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). In other words, the appellate court called upon to decide a collateral order appeal must first determine whether the issue presented falls within that doctrine; if it does not, it *lacks jurisdiction* to decide the appeal. Thus, the base-line jurisdictional obligation of the court of appeals in a collateral order appeal is *not* to assess whether the plaintiffs have standing to sue on the merits, as urged by the Attorney General.[2] Instead, the court of appeals must examine whether the district court ruling it is being asked to review is "conclusive, . . . resolve[s] important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, 514 U.S. at 42 (citing *Cohen*, 337 U.S. at 546). In this exercise of "jurisdiction to determine jurisdiction," once the court finds that the issue raised does not fall within the collateral order doctrine, "the inquiry is

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[2] In contrast, an inquiry into a plaintiff's standing to sue is, of course, common in interlocutory appeals specifically authorized by Congress under 28 U.S.C. § 1292. Thus, inquiry into the plaintiffs' standing is perfectly appropriate in an appeal from the grant of a preliminary injunction, such as occurred in *Ashmus v. Calderon*, 522 U.S. 740 (1998), cited by the Petition. But *Ashmus* does not establish that such an inquiry is appropriate in collateral order appeals.

over"; thus, the court below properly left the Attorney General to appeal the standing issue after a final judgment.[3]

The Attorney General, in fact, points to no decision of this Court involving the collateral order doctrine that authorizes wide-ranging Article III jurisdictional inquiries on issues that do not themselves satisfy *Cohen*. The Attorney General, instead, confuses the question of *the jurisdiction of the court of appeals to decide the Eleventh Amendment jurisdictional issue* presented below with the issue of *the jurisdiction of the court of appeals to review the district court's Article III jurisdiction*. The court of appeals had jurisdiction over the Eleventh Amendment issue under *Cohen*. It did not, however, have jurisdiction over the issue of plaintiffs' standing to sue -- jurisdiction over that issue remains with the district court until final judgment, as do numerous other issues that do not meet the criteria set forth in *Cohen*. Thus, the purported "conflict" is really only a misunderstanding by the Attorney General of when and where he may raise Article III jurisdictional arguments.

In the final analysis, then, the Attorney General is simply asking this Court to allow it to "parlay" its collateral order appeal into a "multi-issue interlocutory appeal ticket[]." *Swint*, 514 U.S. at 50. Because this Court has repeatedly warned against this maneuver, the petition should be denied.

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[3] Of course, the State has the option of seeking certification from the district court. *See Swint*, 514 U.S. at 46 (discussing 28 U.S.C. § 1292(b)); *see also id.* at 50 (discussing holding of *United States v. Stanley*, 483 U.S. 669, 676-77 (1987), that immediate appellate review under § 1292(b) was limited to the order certified by the district court).

II. THE ATTORNEY GENERAL HAS FAILED TO PRESENT A DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF ANY OTHER UNITED STATES COURT OF APPEALS.

The Attorney General points to three decisions which it claims conflict with the decision below. One is simply another decision of the court below, *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212 (11th Cir. 1999); but an intracircuit conflict does not, in itself, merit review by this Court. *See* Sup. Ct. R. 10. A second is a concurring opinion by one judge on a three-judge panel, *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412 (6th Cir. 1996); this, too, does not amount to a conflict with the decision of another court of appeals.

The third purported conflict is with a decision of the United States Court of Appeals for the Fifth Circuit, which addressed the standing of the plaintiffs in that case, and found that the plaintiffs did indeed have standing before proceeding to find that the defendants were immune from suit. *United States v. Texas Tech Univ.*, 171 F.3d 279, 287 n.12 (5th Cir. 1999). But this is a conflict only with dicta, not a holding of the court. The result in *Texas Tech* would have been the same even if the court had remained silent on the issue of the plaintiffs' standing (as did the court below), for *Texas Tech* winds up finding that the government appellants there were immune from suit. Thus, the conflict is, in reality, an illusory one.[4]

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[4] A true conflict would be presented if one court of appeals, in a collateral order appeal on Eleventh Amendment immunity, ordered dismissal based on the plaintiff's lack of standing under the belief that it had an independent obligation to assess the plaintiff's standing even if the plaintiff's standing was not "inextricably intertwined" with the Eleventh Amendment issue. The Attorney General has pointed to no such case.

Because the Attorney General has failed to identify a direct conflict with any other decision from another court of appeals, the Petition should be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: February 2, 2000. Respectfully submitted,

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